35TH CONGRESS, 2d Session. | SENATE. | MIS. DOC. No. 7.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 7, 1858.—Ordered to lie on the table.
DECEMBER 13, 1858.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

THOMAS C. NYE *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Contracts between the Post Office Department and claimant.
3. Depositions taken by the claimant and offered as evidence, transmitted to the House of Representatives.
4. Depositions taken by the United States and offered as evidence, transmitted to the House of Representatives.
5. Letters and circular from the Post Office Department, referred to in the opinion of the Court, transmitted to the House of Representatives.
6. Claimant's brief.
7. United States Solicitor's brief.
8. Opinion of the Court, adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this seventh day of [L. S.] December, A. D., 1858.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

To the Honorable the Court of Claims:

The petition of Thomas C. Nye, a citizen of the State of New York, respectfully showeth: That he entered into the service of the United States in the transportation of the mails prior to the year 1837, and that in the spring of that year your petitioner, in company with others,

entered into contracts with the Post Office Department to transport the daily mails from the city of Utica, in the State of New York, to the village of Ithaca in said State, and also from Utica aforesaid to Binghamton, and also from the village of De Ruyter to Cherry Valley, in the said State; and was also largely interested in the mail contract of J. M. Sherwood, from the city of Albany to the village of Salina in said State, and stocked said road with teams and post coaches.

Your petitioner further shows that the above routes were relet in 1841, and that he was interested in all of them by the renewal of his contracts with the United States government, and that he was the sole contractor from Canastota to Hamilton, also the sole contractor from De Ruyter to Cherry Valley, which last contract was extended to Cooperstown, daily, from Cherry Valley in said State. And that your petitioner continued interested in said mail contracts upon the aforesaid post roads, as above stated, up to 1842 or 1843, when the contract of said Sherwood, from Albany to Salina aforesaid, was transferred to your petitioner, who became thereby, with the assent and approval of the Post Office Department, together with Hiram Lewis, a contractor with said department for carrying said mails from Albany to Cherry Valley, and from Cherry Valley to Syracuse, and all the afore mentioned routes; and that your petitioner, under said contracts, found it necessary to invest a large amount of capital in horses and post coaches, &c., and from the year 1841 up to 1845 your petitioner owned and employed in such service constantly about two hundred horses and a large number of post coaches, and from the year 1841 to 1845 was running over two hundred miles of daily mails upon the aforesaid post roads.

And your petitioner further shows that by the terms and regulations of the Post Office Department then in force, viz: by act of Congress passed March 3, 1825, sec. 4, 5th vol. United States Statutes at Large, p. 103, and by the regulations of the department, a copy of which is hereunto annexed, marked exhibit "A," your petitioner felt secure in making such large investments in horses, coaches, &c., in the government service, because, under the laws and regulations of the Post Office Department above referred to, and particularly the 13th note to the proposals for carrying the United States mail from July 1, 1841, to June 30, 1845, inclusive, and dated December 22, 1840, which reads as follows:

13. On coach routes where the present contractor shall be superseded by an under bidder who may not have the stage property requisite for the performance of the contract, he shall purchase from the present contractor such of his coaches, teams, and harness belonging to the route as shall be needed, and may be suitable for the service, at a fair valuation; and make payment therefor by reasonable instalments, as his pay becomes due, unless the present contractor shall continue to run stages on the route. Should they not agree as to the suitableness of the property, the terms of the security, each may choose a person, who may appoint a third, and their decision shall be final; or the Postmaster General will name the umpire. Should the under bidder fail to comply, his bid will be offered to the contractor;

but should he decline it, the proposals of the under bidder will be accepted unconditionally. The under bidder should give early notice of his intention to take or not to take the stock, and if the latter, of his reasons; and the present contractor is to determine, on the first application, whether he will sell it or not.

He felt justified in placing a good stock on the lines, as, if said regulations had been complied with, he could by no possibility have lost anything.

That your petitioner, in good faith, entered into the mail service of the United States under the law governing the Post Office Department and the regulations thereof, as above stated and referred to, and made the aforesaid large investments of capital in stocking said post roads, and to the amount of at least of *fifty thousand dollars.*

And your petitioner further shows that by the 18th section of the act of Congress approved March 3, 1845, a copy of which is hereunto annexed, marked exhibit "B," it was enacted that no new mail contractor shall hereafter be required to purchase out, or take at a valuation, the stock or vehicles of any previous contractor for the same route.—(5th volume U. S. Statutes at Large, p. 738.)

And your petitioner further shows that in the letting of the mail contracts in the year 1845, on the respective routes and lines hereinbefore specified, and on which your petitioner was a contractor as aforesaid, previous and up to said letting, in the year 1845, your petitioner was an unsuccessful bidder upon all of said post routes, and lost all his contracts for transporting the mails upon said roads or routes.

And by the terms of the lettings of the new contractors upon said post roads the new contractors were not required to purchase out or take at a valuation the stock and vehicles with which your petitioner had supplied and run the said post roads, and your petitioner was left with all of said stock and vehicles for running the said roads upon his hands, without any use or employment for the same, and unavoidably sustained thereby a large amount of damage in disposing of the same.

And your petitioner further shows that he is advised and believes that as he entered into the aforesaid mail contracts under the laws and regulations of the Post Office Department, governing the contract between your petitioner and the said Post Office Department, which required the new contractors to purchase and take at a valuation his aforesaid stock upon the aforesaid post roads, that it was a direct and positive violation of the contracts between your petitioner and the Post Office Department to let the aforesaid mail contracts to new contractors, without requiring them to purchase or take at a valuation the stock with which your petitioner had supplied said post roads, and with which he had been running the same.

Your petitioner further shows that the aforesaid act of March 3, 1845, did not take effect till the first day of July thereafter, and the aforesaid mail contracts for the year 1845 were advertised to be let, with the usual provision requiring the new contractors to purchase or take at a valuation the stock of previous contractors upon the same roads, and that the new contracts on the post roads or routes on which

your petitioner had, previous to said letting for the year 1845, had contracts with the Post Office Department for transporting the mails, were let before the act of March 3, 1845, took effect, and without containing any provision requiring the new contractor to purchase or take at a valuation the stock of your petitioner upon the aforesaid post roads.

Your petitioner therefore insists that he has a just and legal claim upon the United States government for the amount of damages to which he has been subjected by reason of the aforesaid violation of his contract with the Post Office Department.

And whereas, by rule No. 2, the Court requires that the contract shall be printed in the words of the contract, but the contracts in this case being very numerous, to print them would be very expensive, the petitioner herewith files said contracts, marked exhibit C, D, E, F, G, H, I, J, and others on file in the Post Office Department, and prays that they may be taken as parts of this petition.

And your petitioner further states that he has not received any indemnity or satisfaction of his damages aforesaid from any department of the government, and that he has not transferred any portion of his said claim to any other person, but that he is the owner thereof.

Your petitioner would further show that his claim was presented to the Senate of the United States at the first session of the thirty-third Congress, and that it was referred to the Committee on the Post Office and Post Roads, which committee reported a bill for the relief of your petitioner, which passed the Senate and was sent to the House of Representatives, when, at the same session, it was referred to the Committee on Post Offices and Post Roads, on the 14th of July, 1854; and on the 20th of the same month and year said committee reported the Senate bill (being No. 307) without amendment, which, on its second reading, was referred to the Committee of the Whole House, and no further action was had thereon.

D. IRA BAKER, *of Counsel.*

Before me personally appeared Thomas C. Nye, the petitioner named in the above petition, who, being duly sworn, deposes and says that the facts stated in the foregoing petition are true to the best of his knowledge and belief.

Exhibits referred to in above petition and on file in this Court:

A, copy of proposals and regulations of the Post Office Department, under which these contracts were let.

B, copy of part section 18 of the act of Congress passed March 3, 1845.

C, copy of contract with United States.

D, copy of contract with United States.

E, copy of contract with United States.

F, copy of contract with United States.

G, copy of contract with United States.

H, copy of contract with United States.

I, copy of contract with United States.

J, copy of contract with United States.

UNITED STATES COURT OF CLAIMS.

THOMAS C. NYE *vs.* THE UNITED STATES.

Claimant's Brief.

The 1st section of the act of 1825 (4 Stat. at Large, 102) authorizes the Postmaster General to "provide for the carriage of the mails on all post roads that are or may be established by law, and as often as he, having regard to the productiveness thereof and other circumstances, shall think proper."

These very general and comprehensive powers are restrained in only two particulars, viz: requiring contracts to be made after twelve weeks' advertisement, and limiting them to the term of four years.—(Sec. 10th, same act.) The last section of the act repeals all prior laws.

Under this broad power, the "regulation" quoted in the petition was established by the department. It was regularly inserted in all the advertisements, even down to that of December, 1844. This is not disputed; but we have proved it by the production of the books from the department, containing the advertisements for a series of years.

The Postmaster General, in his report of December 1st, 1845, (1st vol. Ex. Doc., 1st sess. 29th Cong., p. 852,) recognizes the "regulation of the department which required the under bidder, in certain cases, to take the stock of the former contractor."

The Solicitor, who has access to the department, admits that the "regulation" was established and acted upon down to the passage of the act of 1845. He disputes only the operation and effect claimed for it.

The "regulations" of the departments, when not contrary to law, are themselves laws. They are recognized as such in the act which establishes this honorable Court, and in the very section which defines its jurisdiction.—(10 Stat., 612.)

This regulation or law of the department enters into and forms part of the contract. It was evidently so intended. The bidder takes the contract subject to the obligation, under proper circumstances, to buy the stock of his predecessor, and with the right to claim the same advantage from his successor. If the rule had not this double operation, it was most unwise and pernicious in its effects upon the interests of the government. For, if it was designed only to force the new contractor to buy old stock at valuation, without reference to a similar right at the end of his term, then its only influence would have been to increase the amount of his bid and enhance the cost of mail transportation, without any advantage whatever to the government. On the other hand, if the rule was designed to operate both at the beginning and the end of the term, it was judicious and beneficial to the interests of the department. This latter is the only rational construction which can be put upon the regulation.

The requirement would never have been made at any of the lettings if the department had not been bound by the pledge of its good faith given to every contractor who made his bid under the regulation. It was for the benefit of the old contractor; it was always a burden and a disadvantage to the new contractor, unless he too should have the right to claim its benefit at the end of his term.

It is obvious that the right arising from the regulation was a material consideration in the mind of the contractor when he made his offer. When he agreed to be liable to take the stock of the old contractor, he must have estimated the value to himself of a similar liability on the part of his successor. It is evident, if he had omitted this latter consideration, his bid would have been different. A consideration for this pledge on the part of the government is therefore necessarily involved in the transaction.

In what manner and to what extent, usages or customs, and laws, enter into and control the terms of written contracts without being specially stated in them, may be seen in the following authorities: Dorsey *vs.* Eagle, 7 Harr. and Gill, 321; Stultz *vs.* Dickey, 5 Binn, 285; Carson *vs.* Blaze, 2 ibid, 187; Van Ness *vs.* Pacard, 2 Pet. 137; Hutton *vs.* Warren, 1st M. & W. 466; Boorman *vs.* Johnson, 12 Wend. 574; Renner *vs.* Bank of Columbia, 9 Wheat. 581, '84, '85; 4 Phill. on Ev., C. & H.'s notes, 1409 and 1456; Story's Con. of Laws, 225, '6, '7. If such be the force of a mere usage or custom, much greater would be that of a departmental regulation, having all the authority of law.

It has been suggested that the regulation might have the effect of extending the contract beyond the term of four years. But this view cannot be correct. The old contract ends at the moment when the new one begins. The regulation itself requires the new contractor to give the old one "*early notice of his intention to take or not to take his stock.*" The evident object was to secure the unbroken continuance of the service by such timely arrangements as were necessary for that purpose. The arrangement did not extend the contract one moment beyond its legitimate term. As soon as the new contract was made, the regulation became attached, and executed itself at the end of the new term. It was a permanent subsisting rule or law, operating upon and controlling the several contracts when respectively made; but the contracts themselves did not partake of the permanence of the rule, or derive from it any extension whatever beyond their stipulated terms.

It is also objected that the old contractor was not compelled to sell to the new contractor, while the latter was bound to buy or forfeit his bid; and therefore, it is said, there was no mutuality. This view is based upon the misapprehension that the obligation was between the old and the new contractor, whereas it was only between the government and the respective contractors. The government pledged itself to the old contractor to give him the option at the end of his term to sell or not to sell his stock at a fair valuation to the new contractor; and at the same time, it also pledged itself to force the new contractor to abide by the choice of the old one in this par-

ticular, upon pain of losing his contract and having it transferred to the other. This option or privilege, of selling or not selling, was valuable to the old contractor. It is this valuable privilege of which the claimant was deprived by the act of 1845, and for the loss of which he now claims damages. Nothing can be more clear than the mutuality, materiality, and controlling character of this positive stipulation between the government and the old contractor. It was an inducement held out by the government of its own accord, enacted into a law of the department, and embodied in all its advertisements, for the express purpose of operating upon the bids of contractors. To say it had not this effect would be to stultify the department, as well as to repudiate its plighted faith.

The act of March 3, 1845, inaugurated a new policy. It prohibited the Postmaster General from "having regard to the other circumstances" which, by the act of 1825, he was required to consider in providing for the carriage of the mails. He was forbidden to look to the incidental object of facilitating travel in connexion with the carriage of the mails, and he was not to take into consideration the interests, or the effects upon the department, of competing lines of stage coaches on the mail routes. Under the former policy of the government, all these important considerations entered into the policy of the department, and its regulations were made accordingly. The one in question was undoubtedly designed, by giving some degree of security to the large investments of the contractor, to save the department from the fluctuating and uncertain influence of the competition and combination of the powerful class of stage proprietors. It might well have considered this particular provision as necessary to place the service upon a substantial footing, so as to secure fair and reasonable bids from the contractors. The regulation was well adapted to the circumstances under which the department was acting up to 1845, and to the policy which had been established under the previous laws of Congress.

The Postmaster General, in his report of December 1, 1845, boasts of having saved $250,000 at the lettings in April of that year, for the New England States and New York alone. This immense saving was accomplished, in part, by the sacrifice of the claimant's rights under his contract. For this very purpose, and solely with a view to economy in the service, the regulation aforesaid was abolished.

The present claimant does not presume to attack the altered policy of the new law. But he insists that this new policy could not have been put in operation, and, in fact, was not carried into effect without a serious sacrifice of his own rights under his then existing contract. The advertisements for the new service were published in December, 1844, and the contracts were to be let, and were actually let, in April following. By joint resolution No. 13, approved the same day, (March 3, 1845,) the act itself was not to go into effect until the 1st of July following. By his proclamation of the 8th of March, the Postmaster General abrogated the old regulation, and, to that extent, abrogated the old contracts, before the new law went

into operation. This he did upon the ground that the new service was to commence on the 1st of July. Whether this was, or was not, the proper construction of the act, is not now, in the least degree, material; for whether the contract was abrogated by the Postmaster General without law, or by virtue of the true construction of the act of Congress, the claimant, in either case, has been deprived of his just rights and is entitled to full remuneration. He was left with fifty thousand dollars' worth of stock upon his hands, and was deprived of the advantage, in disposing of it, which was guarantied to him by his contract with the department. The fact that the advertisement of December, 1844, contained the regulation in question, was an admission on the part of the government, if any such admission were necessary, that the claimant was entitled to its benefit.

The government having thus (for wise purposes it may be) abrogated an important part of the claimant's contract, the latter is entitled to the full amount of damages suffered in consequence of the act. He is not bound to show anything more than the breach on the part of the government, without any fault of his own, and the loss which it occasioned.

The letter of the department, in answer to inquiries by the court, admits that the new contractors were previously unknown to the department as contractors, and, *prima facie*, had not the stock necessary for the service. Such is the presumption of law, and the claimant is not bound to prove a negative. If the fact were not in accordance with this presumption, the government would undoubtedly have proved it. The contract having been abrogated by the legislative power, the claimant could have had no right to call upon the new contractor, or in any particular to inquire into his business. The government had absolved the new contractor from all liability, not having made it a condition that he should take the old stock, or surrender the contract to his predecessor.

Neither did the claimant forfeit his right to run an opposition line of coaches on the routes. The government had thrown the property on his hands, not giving him the opportunity to sell to the new contractor. He had the perfect right to find for it whatever use he could, without forfeiting his claim to damages from the government. But he did not so employ his stock. The proof is, that the stock remained for some time useless on his hands—the horses consuming provender, and the coaches and harness depreciating by rust and rot. This fact is sufficiently clear from the testimony of the witnesses; but the Solicitor has introduced the affidavit of the claimant and the statements of his original petition to Congress, in which the fact is positively stated and sworn to. But, as we are not required to prove a negative, the burden of proof in this respect, also, is upon the government.

It only remains to show the actual loss of the claimant. This we have done by the most ample proof, showing the great depreciation of value in such property when thrown out of its legitimate employment. We have not followed every separate horse, &c., to the auctioneer's block, or to the hands of the purchaser. This would

have been an endless task, most unreasonable to require at the hands of the claimant.

The following is a statement of the items of stock on hand actually employed by the claimant in carrying the mails:

180 horses, at $150 each	$27,000
20 coaches, at $450 each	9,000
20 sleighs, at $250 each	5,000
20 wagons, at $250 each	5,000
40 sets harness, at $50 per set	2,000
	48,000

The testimony of the witnesses as to the depreciation varies from 30 to 80 per cent.; the average would be 55 per cent.; and this would make the loss amount to $26,400.

This is claimed to be the loss sustained by the claimant. No other rule for estimating it has been, or probably can be, suggested by the Solicitor. The principle involved seems to have been admitted in the reports made by the committees of both Houses of Congress, and in the bill which was passed by the Senate of the United States, and which would doubtless have passed the lower House, if it had been acted on at all.—(See Senate Rep. 191, Bill No. 307, 1st sess. 33d Cong.)

The petitioner claims interest upon his losses. If this cannot be allowed, he at least begs that the Court will consider the hardship of his case; the arbitrary, even if politic, act of the government, in destroying his rights, without at the same time providing indemnity; and finally, the long delay and expense which have attended his effort to obtain justice. These considerations ought to secure an allowance in the shape of damages fully equal to the loss, with interest to the present day.

FRED. P. STANTON,
For the Claimant.

IN THE COURT OF CLAIMS—No. —.

THOS. C. NYE *vs.* THE UNITED STATES.

Solicitor's Brief.

The case stated by the petitioner is, that he became a mail contractor in the year 1837, and that his contracts were renewed in 1841. At the time these contracts were taken, there were notes attached to the proposals, that when a new bidder superseded a present contractor, and had not the stage property requisite for the performance of the contract, he was required to purchase from the old contractor (if the old contractor would sell) his coaches, horses and harness; and, if they could not agree on the price, the property was to be taken at

a fair valuation. He says this was a regulation of the department, and under it he felt safe in making large investments in stock, &c. That by the 18th section of the act of 1845, the Postmaster General was forbidden to require the new contractor to purchase the stock of the old contractor. That this was a breach of his contract, whereby he has lost the sums stated in his account. In this case, on behalf of the United States, we contend:

I. That the 4th section of the act of 1825 contains no such stipulation as the petitioner relies on. It is to be found only in the note thirteen in the advertisement for contracts made in 1841, and in other years. It is no part of the contracts made with the petitioner. It is not incorporated in them. The petitioner neither avers nor proves that he ever under bid any other contractor, or came under the operation of this rule in any form or manner. He is, then, seeking to make a regulation of the department, which never bore on him, the means of recovering damages from the government.

II. This regulation is not a part of the contract, or of any of the contracts, made with him. It is not inserted in those contracts, and cannot, by any rule of interpretation, be made part of them.

Let us see what is the true character of this regulation:

1st. It requires every under bidder who has not the requisite stage stock to purchase or take at valuation the coaches, &c., of the contractor he under bids.

2d. If the old contractor continues to run on the route, then the under bidder is not required to take his property.

3d. If the under bidder refuses to take the property, then the contract is to be offered to the old contractor; and if he refuses to take it at the under bidder's offer, after then it is to be let unconditionally to the under bidder.

4th. If the under bidder offer to take the stock, the old contractor may refuse to sell it.

From this statement of the terms of the regulation, it is clear they are conditions imposed on competing bidders, and not part of the contract entered into between the department and the contractors; for it is not to be imagined that the government, by its regulation, would contract with a contractor to insure him a purchaser of his property, without requiring him to sell the same. There is such a want of mutuality as could not enter into the contract. The department does not, by this arrangement, propose to take the property itself, or to make itself responsible in damages to the old contractor for the conduct of the under bidder; but it imposes these complicated terms on the under bidder as prerequisites to obtaining the contract, and the only penalty for non-compliance is, he shall not have the contract. Clearly, the government has never stipulated with this or any other contractor that it would impose any such restrictions on competing bidders, nor has it in any way stipulated it would be responsible if the under bidder would not take the property of the old contractor.

III. This is a claim on the government for damages because the new contractors were not required to buy the property of the old contractors. It is an effort to charge the government with damages, not

for property used and received by it, but because it would not compel a third person to take the property of the plaintiff; no such promise has been made expressly—no such promise can be implied without an adequate consideration, and no such consideration has either been averred or proved.

IV. The law of 1845 was passed on proper and just considerations, and by its provision a new mode of contracting is introduced.

See letter of Postmaster Johnson, Senate Doc., page —.

The policy of the regulation in question is doubtful. It was designed doubtless by the department to protect the government from the losses incurred by incompetent men thrusting themselves into contracts without means to execute them. The practical effect was perhaps to create a monopoly of contracts in the hands of the old contractors; such a result could not have been designed, and was of itself sufficient to have produced the rescision of the rule. Clearly, when Congress was about to introduce cheap postage, and with it a cheap system of contracts, this monopoly could not remove the inhibition to impose such restrictions on competition illegal. If loss was sustained by the old contractors, it was *damnum absque injuriâ.*

V. But if in proper cases this thirteenth note was part of the contract, the plaintiff has not shown that he is entitled to its benefit; for he does not show—

1st. That he got his contracts by under bidding other contractors, and was compelled to take their property.

2d. He does not show that the competing bidders had not themselves the property requisite to execute their contracts.

3d. He does not show that he did not run opposition to them.

4th. He does not show that he would have taken the contracts at the bids of his competitors if they would not have purchased his property.

VI. On the face of the accounts and evidence, the plaintiff's claim is an exaggerated and inflamed estimate, and therefore unjust to the government.

The regulation requires the under bidder to take from the old contractor, at a fair price, his coaches, teams, and harness. The account states one hundred and eighty horses at $150 each, and makes the loss, by failure to compel the new contractor to take them, one hundred and twenty dollars on each horse. Horses are things valuable for general purposes. If these horses were worth for other purposes no more than $30 a head, it is absurd to say they were worth $150 for stage purposes; and the conclusion that the government should pay petitioner $120 per head for not compelling the new contractor to take these horses is manifestly illogical and unjust. If, under the regulation, the new contractor could have been compelled to take them, it must clearly have been at their value when he took them. The plaintiff has not proved what he did with these horses. But if, on the 1st of July, 1845, they were worth $150 each for the arduous service of staging, they must have been worth more than $30 in the market for other purposes.

The same course of reasoning shows the injustice of claim for loss

on twenty coaches and forty sets of harness. The charge for two sleighs, twenty wagons, coach shops, blacksmith shops, and harness shops, are for things not in the regulations, and their only effect on this case is to manifest a desire to make an enormous bill against the government.

D. RATCLIFFE,
Assistant Solicitor of Court of Claims.

IN THE COURT OF CLAIMS.

THOMAS C. NYE *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court.

The petitioner alleges that he was a contractor for carrying the mails of the United States prior to the year 1837.

On the 31st day of May, A. D. 1837, the petitioner and others entered into a contract with the United States to carry the mail from Utica to Ithaca, at the rate of $1,605 for every quarter of a year during the continuance of the contract; the contract to commence on the 1st day of July, A. D., 1837, and continue in force till the 30th day of June, A. D. 1841.—See "Exhibit I."

On the same 31st day of May, A. D. 1837, the petitioner and others entered into a contract with the United States to carry the mail from Utica to Binghamton, at the rate of nine hundred and fifty dollars for every quarter of a year during the continuance of the contract; the contract to commence on the first day of July, A. D. 1837, and continue in force until the 30th of June, A. D. 1841.—See "Exhibit H."

On the same 31st day of May, A. D. 1837, the petitioner entered into a contract with the United States to carry the mail from Cherry Valley to De Ruyter, at the rate of eight hundred and seventy-five dollars for every quarter of a year during the continuance of the contract; the contract to commence on the 1st day of July, A. D. 1837, and continue in force until the 30th day of June, A. D. 1841.—See "Exhibit C."

On the 22d day of April, A. D. 1841, the petitioner entered into a contract with the United States to carry the mail from Canastota to Hamilton, for and during the term commencing the first day of July, A. D. 1841, and ending with the 30th day of June, A. D. 1845, at the rate of *five hundred dollars a year*.—See "Exhibit E."

On the 21st day of April, A. D. eighteen hundred and forty-one, the petitioner entered into a contract with the United States to carry the mail from Cherry Valley to De Ruyter, for and during the term commencing on the first day of July, A. D. 1841, and ending with the 30th day of June, A. D. 1845, at the rate of *one thousand five hundred and eleven dollars* a year.—See "Exhibit D." On the tenth day of August, A. D. 1841, this route was extended to Cooperstown,

at the rate of the additional sum of *two hundred and fifty dollars* a year.—Ibid.

The petitioner alleges that in 1837 he was largely interested in the mail contract of J. M. Sherwood from the city of Albany to Salina, and that in 1842 or 1843, "the contract of said Sherwood from Albany to Salina aforesaid, was transferred to your petitioner, who became thereby, with the assent and approval of the Post Office Department, together with Hiram Lewis, a contractor with said department for carrying said mails from Albany to Cherry Valley, and from Cherry Valley to Syracuse." The proof is, that on the seventh day of September, A. D. 1842, the petitioner and Hiram Lewis entered into a contract with the United States to carry the mail from Cherry Valley to Syracuse, for and during the term commencing the first day of October, A. D. 1842, and ending with the 30th day of June, A. D. 1845, at the rate of *four thousand dollars* a year; and that on the 7th day of September, A. D. eighteen hundred and forty-two, the petitioner and Hiram Lewis entered into a contract with the United States to carry the mail from Albany to Cherry Valley for the same term, at the rate of *twenty-seven hundred dollars* a year.—(See "Exhibit G" and "Exhibit F.") There is no evidence amongst the papers on file to connect these last two contracts with any contract with J. M. Sherwood, or to show that the Post Office Department ever made any contract with him.

The petitioner alleges that, under his contracts with the United States, he found it necessary to invest a large amount of capital in horses, post-coaches, &c., and that from the year 1841 up to 1845 he "owned and employed in such service constantly about two hundred horses and a large number of post-coaches." The witnesses, Van Valkenburgh and Hilton, concur in testifying that in 1845 when the petitioner ceased to carry the mail, he had on hand the following property which he used in the transportation of the mail, and which they estimate as follows: 180 horses, at $150 each; 20 stage-coaches, at $450 each; 20 stage sleighs, at $250 each; 20 double stage wagons, at $250 each; and 40 sets of four-horse harness, at $50 each—making a total of $48,000.

The 13th note to the proposals for carrying the mail, from the 1st day of July, A. D. 1841, till the 30th day of June, A. D. 1845, both days inclusive, is as follows: "On coach routes where the present contractor shall be superseded by an underbidder who may not have the stage property requisite for the performance of the contract, he shall purchase from the present contractor such of his coaches, teams, and harness belonging to the route, as shall be needed, and may be suitable for the service, at a fair valuation, and make payment therefor by reasonable instalments, as his pay becomes due, unless the present contractor shall continue to run stages on the route. Should they not agree as to the suitableness of the property, the terms of the security, each may choose a person who may appoint a third, and their decision shall be final; or the Postmaster General will name the umpire. Should the underbidder fail to comply, his bid will be offered to the contractor; but should he decline it, the

proposals of the underbidder will be accepted unconditionally. The underbidder should give early notice of his intention to take or not to take the stock, and if the latter, of his reasons; and the present contractor is to determine on the first application, whether he will sell it or not." This note is treated by the petitioner as a regulation of the Post Office Department. The Postmaster General in his annual report of December 1, A. D. 1845, and in his letter to the mail contractors appended to that report, speaks of it as a regulation of his department.—(See 1 vol. Ex. Doc., 1 Sess. 29th Cong., pp. 852, 876.) The present Postmaster General in his letter of the 29th day of January, A. D. 1857, says: "It was a regulation or *requirement* of the department." And the present Second Assistant Postmaster General in his letter of the 8th day of July, A. D. 1856, speaks of it as a regulation of the department, and says that it is correctly quoted in the petition.

By the act of Congress approved March 3, A. D. 1845, it was provided, "that it shall be the duty of the Postmaster General, in all future lettings of contracts for the transportation of the mail, to let the same in every case to the lowest bidder, tendering sufficient guarantees for faithful performance, without other reference to the mode of such transportation than may be necessary to provide for the due celerity, certainty, and security of such transportation; nor shall any new contractor hereafter be required to purchase out, or take at a valuation, the stock or vehicles of any previous contractor for the same route.—(5 Stat. at L., p. 738, ch. 43, § 18.)

In the month of December, A. D. 1844, the Postmaster General advertised for proposals for carrying the mails on the routes above mentioned for the term of four years from the first day of July, A. D. 1845; and in his advertisements was inserted the 13th note already noticed; but on the 8th day of March, A. D. 1845, he issued a circular in which he called the attention of persons desiring to contract to the provisions of the act of March 3, A. D. 1845, and gave notice that no new contractor would be required to purchase out, or take at a valuation, the stock or vehicles of the previous contractor for the same route.

By a joint resolution of the Senate and House of Representatives, it was provided that the act of March 3, A. D. 1845, above referred to, should go into effect on and after the 1st day of July then next following, and not sooner.—(5 Stat. at L., p. 800.)

The petitioner alleges that in the letting of the mail contracts in the year 1845, on the respective routes and lines on which he was a contractor previous and up to the letting, he was an unsuccessful bidder, and lost all his contracts for transporting the mails thereon; that the new contractors not being required to purchase out, or take at a valuation his stock and vehicles, the whole thereof was left on his hands without any employment or use for the same; that the failure of the Postmaster General to require the new contractors to purchase out, or take at a valuation his stock and vehicles, was a direct violation of his contracts with the United States; and that he has thereby sustained heavy damages.

None of the contractors at the lettings in the spring of 1845, on the routes embraced by the petitioner's contracts, were "old coach contractors."—(See the letter of the Postmaster General to the clerk of this court, dated December 30, A. D. 1856.)

The principal inquiry presented for our consideration in this case is, has the petitioner shown a contract, either express or implied, with the United States, by which they undertook that if he should be succeeded by an underbidder, the latter should be required to purchase his stock and vehicles; or, in other words, that such underbidder should be required to comply with the 13th note?

In determining this question it is necessary to understand the true character of the 13th note, and the purpose for which it was used. It is called, as we have seen, a regulation of the Post Office Department. How and in what sense it was a regulation of that department is shown by the letter of the Postmaster General to the mail contractors appended to his annual report of December 1, A. D. 1845, and in the letter of the Postmaster General of the 29th day of January, A. D. 1857. In the former he says: "The condition requiring a new contractor to take the property of a prior one was a regulation of the department attached to the advertisement, and not exacted by any law, and can have no bearing upon any other contract than the one made under it." In the latter he says: "I beg leave to say that the 'regulation' 13, therein quoted was, as stated by the petitioner, one of the 'notes' attached to the advertisement inviting proposals for carrying the mail in New York from 1841 to 1845, and had been in use for many years in all the advertisements for mail letting throughout the Union, until the passage of the act of Congress of March 3, 1845." From these statements we infer that whenever advertisements were issued inviting proposals for carrying the mail on coach routes, the 13th note, by order of the department, constituted a part of them; and that it was not designed to bear on any other contracts than those made under such advertisements. There was no act of Congress, and no regulation of the department requiring the 13th note to be inserted in *all* such advertisements. When the period at which advertisements were to be issued arrived, whether it should be inserted in them or not was a matter resting entirely in the discretion of the Postmaster General for the time being. It was called a regulation merely because it was the creature of the department. A compliance with it by an underbidder was imposed as a condition precedent to the acceptance by the United States of his proposals, That was its whole object; and when that object was accomplished the 13th note had performed its office in reference to the particular contract to which it applied.

Such is our understanding of the true character and purpose of the 13th note. So considering it, it seems to us that in its very nature it was applicable only to the proposals of underbidders, made under the particular advertisements to which it was annexed; and that the mere fact that it had been over and again, at many successive lettings, inserted in the advertisements and made a condition precedent to the acceptance of the proposals of underbidders, created no

obligation whatever on the part of the United States to use it in subsequent advertisements.

Each particular contract for carrying the mail is, under the acts of Congress, a special contract, and the mutual rights and obligations of the parties are to be found in the contract itself. The mere fact that the advertisements inviting proposals for such contracts have for a series of lettings contained a particular provision, cannot constitute a usage. Each particular insertion of the provision was made, not because it had been made before, but because in the opinion of the head of the department the public interests required it; and the insertion of one year had no more influence on the insertion of the succeeding year than the latter had upon the former. Each insertion was a separate and independent transaction in itself—a special regulation for that particular occasion—and was unaffected by anything of the same kind which preceded or followed it. The use of it, therefore, no matter how often, created no obligation to continue its use. It was as new on each succeeding occasion on which it was used as if it had never been used before. The reason of this is obvious. The whole business connected with each contract for carrying the mail was matter of special arrangement, and all its details were expressly, item by item, declared and agreed upon; and each contract was a separate, distinct, and independent transaction. If a special contract be made to continue for a limited period, and it be renewed again and again, no matter how often—if on each occasion the same formalities are observed as at the beginning and a special contract is made—there would be no more obligation to make it the hundredth time, after it had been made ninety and nine times, than there was to make it the second time, after it had been made once. The mere repetition of a special contract no matter how often can not create a usage.

We do not mean to say that a special contract cannot be affected by usage. The language of such a contract may be interpreted by usage; and *incidents* may be annexed to it by usage. Usage is admissible to show the meaning of the words "cotton in bales," (Taylor *vs.* Briggs, 2 C. & P., 525;) and a lessee by deed may show that by the custom of the country he is entitled to an away-going crop, though no such right is reserved in the deed.—(Wigglesworth *vs.* Dallison, 1 Doug. R., 201; Dorsey *vs.* Eagle, 7 Harr. & Gill, 321; Stultz *vs.* Dickey, 5 Binn., 285; Carson *vs.* Blaze, 2 ibid., 487; Van Ness *vs.* Pacard, 2 Peters' R., 137; Hutton *vs.* Warren, 1 Mees. & W., 466.) This is allowed upon the presumption that the parties did not intend to express in writing the whole of the contract, but to make the contract with reference to the usage.—(Hutton *vs.* Warren, 1 Mees. & W., 475; Boorman *vs.* Johnston, 12 Wend. R., 574.) The rule it is said does not add new terms to the contract, but it shows the full extent and meaning of those which are contained in the instrument.—(1 Greenlf. on Ev., § 294.)

And so where negotiable paper is payable with grace, parol evidence of the known and established usage of the bank at which it is payable is admissible to show on what day the grace expired.

(Renner *vs.* Bank of Columbia, 9 Wheat. R., 581.) Evidence of usage is received for the purpose of ascertaining the sense and understanding of parties by contracts made with reference to such usage; for the usage then becomes a part of the contract, and may not improperly be considered the law of the contract; and it rests upon the same principle as the doctrine of the *lex loci*.—Per Thompson, J., in ibid., 588.

But in all these cases the usage existed independently of the contracts, and was by implication made a part of them, because they were made with reference to it. The contracts did not create the usage, but the usage showed that the contracts so made had the meaning which the usage attached to them. There is nothing of this sort connected with the contracts in question. At some period, when, does not distinctly appear, the Postmaster General invited proposals by advertisements to which the 13th note was appended. This was done again and again till the year 1845. In the meantime the petitioner had become interested as a contractor. It may be that he was an underbidder, and required to comply with the 13th note. Was he so required because the same condition had been imposed on his predecessors for many previous lettings, and it had thereby become a law that such a condition should be imposed, or was it for some other reason? The answer to this question is easy and simple. The reason for imposing this condition was the same in each particular instance. It was because the Postmaster General who had authority to prescribe it, had ordered it, and in ordering it was governed by a due regard to the public interests. No one would contend that after having imposed this condition in the first instance, there was any obligation on the government to impose it a second time. Hence the first contractor on whom it was imposed had no reason to regard its imposition upon his successor as a certainty. There can be no ground to insist that he had. Hence, if the petitioner were such first contractor, his claim, it is obvious, would be groundless. But why? Because a single instance would not establish a usage? But if a single instance would not, how many would? It would, indeed, be difficult to distinguish between the rights of the first underbidder on whom this condition was imposed, and those of the petitioner whose contracts were made many years afterwards. The one had just as much reason to expect that the 13th note would be imposed on his successor as the other; neither had a right to require it. Both of them stood upon the same footing, enjoying precisely the same rights, neither having any advantage over the other. And this is as it should be. But why? Because they both made precisely the same kind of contracts, in reference to the same subject matter, and under precisely similar circumstances.

These views are strengthened if not rendered conclusive, by that provision of the act of 1825, which requires that no contract for carrying the mail shall be entered into for a longer term than four years. 4 Stat. at L., p. 105, ch. 64, § 10. The policy of this provision is manifest. Under its operation, each contract for carrying the mail must necessarily be a separate transaction and confined within the limits of four years.

It was a measure suggested by a due regard to the interests to be affected by it. It was easy to see that a more enlarged experience would from time to time suggest various improvements in every branch of the Post Office Department. To meet these and profit by them, it was but ordinary prudence to keep the government as untrammeled as practicable in all respects. The United States are, accordingly, divided into four sections, in one of which contracts for carrying the mail are made every year, no contract being entered into for a longer term than four years. A more apt illustration of the necessity and propriety of such a policy could not be suggested than that which is furnished by the important changes which were made by the act of 1845. If the claim set up by the petitioner be well founded, the alternative was then presented to the United States of either postponing the commencement of the "new policy" then "inaugurated" for four years, and its introduction into all parts of the United States for seven years, or of submitting to the payment of damages to all contractors for carrying the mails, situated like the petitioner, for a breach of the contracts made with them. But if the system be such as we suppose it to be, then no such contracts were made, and the United States were at full liberty to enter upon the new policy on the 1st day of July, A. D. 1845, and to complete its introduction into all parts of the Union at the expiration of three years thereafter. It was, we think, for the very purpose of keeping themselves thus untrammeled, that the act of 1825 required that no contract for carrying the mail should be entered into for a longer term than four years. And hence, the pretensions of the petitioner are inconsistent with the policy of that act.

So far, therefore, from the petitioner being at liberty to look to the imposition of the 13th note on his successors as a matter embraced by his contracts, he must be presumed to have known that under the operation of the act of 1825, they could not be so made as to interfere with those which were to follow them. There was nothing in his contracts—not a word or syllable—which justified such an extension of them. He was not authorized to look to the renewal of the 13th note as anything more than a contingency, and we cannot presume that as a prudent man he contracted with reference to it under any other aspect. But we are obliged to presume that he contracted with reference to the act of 1825, and that he made his estimates accordingly. If he did more, it was his own folly, and he alone must suffer the consequences. The government of the United States is in no respect responsible to him.

We are of the opinion that the petitioner is not entitled to relief.